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In The
Supreme Court of the United States
October Term, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATEMENT OF RESPONDENT

Pursuant to this Court's Rules 34.2 and 22.1, Respondent Ute Indian Tribe makes this Statement for the limited purpose of correcting a misleading assertion in the Petition.

This litigation involves the question of whether Congress, when opening Indian lands to non-Indian entry in 1897 and 1905, disestablished two Ute Indian Reservations located in the remote northeast corner of the State of Utah. Three separate parcels of land were opened by the two Acts. The first parcel involves the unallotted lands of the Uncompahgre Reservation opened by the 1897 Act, nearly all of which are presently owned either by the United States or the Ute Indian Tribe. The second parcel involves the unallotted portions of the Uintah Valley Reservation where Indians and non-Indians have lived side by side for eighty years since the Reservation's opening by the 1905 Act. Finally, the third parcel involves those lands of the Uintah Valley Reservation set aside in the 1905 Act for national forest purposes under United States ownership and control. The Uintah Valley Reservation national forest lands, like the Uncompahgre Reservation lands, are uninhabited.[1]

The Court of Appeals, affirming the District Court, held that the opening of the unallotted lands of the Uintah Valley Reservation did not disestablish that Reservation. Further, the Court of Appeals reversed the District Court, and held that the opening of the unallotted lands of the Uncompahgre Reservation and the setting aside of national

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[1] Over time the affected reservations have been referred to by a number of names. For purposes of clarity, we refer to them individually as the Uintah Valley Reservation and the Uncompahgre Reservation and together as the Ute Indian Reservations.

forest lands on the Uintah Valley Reservation also did not disestablish those two Ute Indian Reservations. The State of Utah and its subdivisions seek review of each of the Court of Appeals' rulings.

The Petition misleadingly implies that the Court of Appeals' decision suddenly thrusts a number of non-Indians living in the isolated Uinta Basin located in northeast Utah into the status of Ute Indian Reservation residents, subjecting them for the first time to some forms of federal and tribal civil jurisdiction. Pet. 10-11. A review of the lower courts' findings shows, to the contrary, that since 1905 the non-Indians of the Uinta Basin have continuously lived side by side with their Indian neighbors subject to an overlapping mixture of federal, state, and tribal influences and jurisdiction.

In the proceedings below, both courts considered the jurisdictional status of the Uinta Basin. The courts concluded that in the eighty years since the 1905 opening of the unallotted lands of the Uintah Valley Reservation, Indians (living primarily on 217,000 acres of restored opened lands) and non-Indians (living primarily on unrestored opened lands) have coexisted side by side subject to overlapping governmental jurisdiction:

> The "jurisdictional history" of the Uintah [Valley] Reservation is less than clear or consistent. Plaintiff offers evidence of the exercise of federal and tribal criminal jurisdiction over the Reservation since 1921. . . . The defendants offer a similar collection of state prosecutions beginning in 1915 and ending in 1967. . . . The annual reports of the Uintah [Valley] Agency range in reference from an acknowledgement of state jurisdiction over the reservations to the assertion of exclusive federal jurisdiction. Other historical exhibits run either direction. (footnotes omitted)

Pet. App. 265a.

> One thing is certain: the jurisdictional history of the Uintah [Valley] Reservation is not one of "unquestioned" exercise of state authority. . . . The record evidences substantial jurisdictional contributions and confusion, which are now to be resolved by the judgment of this Court.

Pet. App. 268a-269a.[2]

In actuality the real issue at hand is not that for the first time non-Indians have been thrust into a Ute Indian Reservation, but rather, the geographical scope of the Ute Indian Reservations. In a word, the Petitioners attempt to reshape the Court of Appeals' holdings from a decision that addresses land status to one that impacts people. It is important to remember that except for the unallotted lands of the Uintah Valley Reservation opened in 1905 where the Indian and non-Indian populations have lived side by side for over 80 years, most of the lands of the Ute Indian Reservation are virtually uninhabited and do not play any significant role in the lives of the non-Indian residents of the Uinta Basin. Indeed, except for the 1948 congressional action creating the 500,000 acre Hillcreek Extension of the Ute Indian Reservation (which largely sits within the boundaries of the Uncompahgre Reservation), the United States owns nearly all of the lands contained within the national forest boundary and the Uncompahgre Reservation. At best, only a handful of non-Indians and tribal members have ever inhabited these isolated lands.

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[2] The District Court specifically addressed Petitioners' jurisdictional concerns noting: "[T]his Court's determination of the boundaries of the Unitah and Ouray Indian Reservation should simplify the administration of the law by resolving the nagging disputes that have marked the 'jurisdictional history' of that area for years." Pet. App. 290a.

Hence, the Petition is misleading when it suggests that certiorari should be granted because the Court of Appeals has dramatically changed the circumstances under which the non-Indians of the Uinta Basin are to live. In fact, as we next show, the Court of Appeals, after careful and deliberate review, confirmed that Congress has always intended that the isolated and sparsely inhabited northeast corner of Utah remain in large part Indian country under primarily federal jurisdiction.

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SUMMARY OF ARGUMENT

The Petitioners claim that the Court of Appeals failed to properly apply this Court's governing precedents, and as a result this Court is obligated to review the voluminous historical record and correctly apply the well-established Reservation diminishment tests. As this Brief shows, the Court of Appeals faithfully followed this Court's well-established governing rules and concluded that the historical record contains no evidence that Congress clearly intended to disestablish the Uintah Valley and Uncompahgre Indian Reservations located in remote northeast Utah. Hence, the answers which the Petitioners seek from this Court have already been provided by the Court of Appeals. Additional review by this Court will be repetitive and is unnecessary. The Petition for certiorari should be denied.

———o———

REASONS TO DENY THE WRIT

I

THE COURT OF APPEALS FAITHFULLY APPLIED THIS COURT'S SETTLED PRECEDENTS IN HOLDING THAT THE 1897 AND 1905 ACTS DID NOT DISESTABLISH ANY PART OF THE UTE INDIAN RESERVATIONS.

The Court of Appeals diligently applied this Court's precedents governing reservation disestablishment. *See,* Pet. App. 12a, 13a, 18a, and 19a, citing *Mattz v. Arnett,* 412 U.S. 481 (1973), *DeCoteau v. District County Court,* 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), and *Solem v. Bartlett,* 465 U.S. 463 (1984). These precedents make it clear that before finding that an Indian reservation has been disestablished, a reviewing court must first "satisfy the requirement that a 'congressional determination to terminate' [an Indian reservation] be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Rosebud v. Kneip,* 430 U.S. at 586. Here, the Court of Appeals carefully reviewed the exhaustive historical record before it and determined that the statutes at issue did not show an "unequivocally demonstrated congressional intent to diminish". Pet. App. 19a, citing *Rosebud,* at 587-588. The Court of Appeals further noted that the legislative history and surrounding circumstances did not support a congressional intent to disestablish, in part because the historical record failed to show an "understanding on the part of the Tribe that they would lose their reservation". . . . Pet. App. 13a, citing *Rosebud, supra,* and *DeCoteau, supra.*

After its careful and comprehensive review of the record, the Court of Appeals concluded:

> In closing, we find no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations.[3]

Pet. App. 14a. In so holding, the Court of Appeals faithfully applied this Court's governing precedents[4] to the unique history of the Ute Indian Tribe and its 1861 and 1882 federal Reservations, established by the United States decades before Utah gained statehood. Hence, further review by this Court is not required.

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[3] However, the Court of Appeals did find that Congress had extinguished all of the Ute tribal interests in two small portions of the Unitah Valley Reservation. Relying on the Act of May 24, 1888 (25 Stat. 157) which required a ¾th vote of the Ute tribal membership to effect a complete severance of tribal interests, and relying on the Act of April 4, 1910 (36 Stat. 269), the Court of Appeals concluded that the reservation status of the Gilsonite Strip and the Strawberry Reservoir Reclamation Project lands had been terminated. Pet. App. 24a.

[4] The dissenting opinion of the Court of Appeals inexplicably chose to disregard this Court's most recent precedent, stating "The Supreme Court in *Solem v. Bartlett,* 465 U.S. 463, 104 S. Ct. 1161, 79 L.Ed.2d 443 (1984), considered the Cheyenne River Act of May 29, 1908. The Act authorized the Secretary to *sell* portions of the Reservation within a described area with the proceeds to go to the benefit of the Indians. The opinion considers the older cases herein referred to but only decided the consequences of the Act authorizing sales. It does not provide direction as to our problem." (emphasis in the original) Pet. App. 34a.

A. The Court of Appeals Properly Found No Express Language of Cession in the Federal Statutes Opening the Uintah Valley and Uncompahgre Reservations.

First, the Court of Appeals carefully reviewed the language of each of the two opening Acts for any expression by Congress of an intent to disestablish the Reservations. In undertaking this review, it contrasted the clear and unequivocal language of cession found in certain Acts affecting the Ute Tribe's Reservation rights[5] with the more equivocal language utilized by Congress in the 1897 Act opening the Uncompahgre Reservation and the 1905 Act opening the Uintah Valley Reservation. Pet. App. 24a-25a.

In reviewing the language of the 1897 Uncompahgre Reservation opening Act (quoted below), the Court of Appeals found no congressional plan to extinguish all Indian interests in the Reservation. Pet. App. 18a-19a, citing *Mattz* and *Rosebud*.

> And all the lands of said Uncompahgre Reservation now theretofore allotted in severalty to said Uncompahgre Utes shall . . . be open for location and

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[5] *See*, Act of May 24, 1888, 25 Stat. 157 (terminating the Gilsonite Strip through a ¾ vote of the tribal membership); Act of April 4, 1910, 36 Stat. 269 (terminating the Strawberry Reservoir reclamation lands); and the Act of June 15, 1880, 21 Stat. 199 (extinguishing the Ute Indians' rights to their Colorado Reservation). In the Act of April 4, 1910, Congress provided that "All right, title and interest of the Indians in the same [reclamation] lands are hereby extinguished . . . .", 36 Stat. at 285, and in the Act of June 15, 1880, Congress ratified an agreement with the Ute Indians where the Indians agreed to "cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement. 21 Stat. at 201.

entry under all of the land laws of the United States. . . .

30 Stat. 87.

Similarly, in reviewing the language of the 1905 Act opening up the unallotted lands on the Uintah Valley Reservation, the Court of Appeals found no congressional intent to disestablish. As noted below, the 1905 opening language is remarkably similar to the 1892 opening Act found by this Court in *Mattz v. Arnett, supra,* not to have disestablished the Klamath River Indian Reservation.

1905 Uintah Valley Act	*1892 Klamath Act*
That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and townsite laws of the United States.	That all of the lands embraced in what was Klamath River Reservation . . . are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights. . . .
33 Stat. at 1069.	27 Stat. at 52.

Finally, the Court of Appeals scrutinized the following language of the 1905 Act for evidence of congressional intent to remove the forest lands from the Reservation.

> That before the opening of the Uintah [Valley] Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, . . . such portion of the lands within the Uintah [Valley] Reservation as he considers necessary, and he may also set apart and reserve [reclamation] lands necessary to conserve and protect the water supply for the Indians. . . .

33 Stat. at 1070.

In scrutinizing this language, the Court of Appeals noted that when Congress desired to disestablish the Reserva-

tion reclamation lands set apart by the equivocal language quoted above, Congress felt it necessary to enact separate legislation five years later (in 1910) expressly extinguishing the Ute Indians' rights to such lands:

> All right, title and interest of the Indians in the same [reclamation] lands are hereby extinguished, and control thereof shall pass to the owners of the land irrigated from said project. . . .

36 Stat. at 285.[6] The Court of Appeals, finding no subsequent congressional legislation paralleling the above quoted act extinguishing the Reservation reclamation lands, concluded that the 1905 Act did not on its face show a clear congressional intent to disestablish the Reservation forest lands. Pet. App. 28a.

The Court of Appeals' rulings that the 1897 and 1905 opening Acts do not on their face reveal "a congressional determination to terminate" are mandated by a faithful application of this Court's governing precedents, and do not require review.

B. The Court of Appeals Correctly Held That The Legislative History and Surrounding Circumstances Do Not Indicate An Unambiguous Congressional Intent to Terminate the Ute Indian Reservations.

After carefully reviewing the language of the 1897 and 1905 Acts, the Court of Appeals turned to the second part of the test set forth by this Court's governing precedents and inquired whether a congressional intent to dis-

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[6] As noted *supra*, p. 6, n.3, the Court of Appeals held these reclamation lands, as well as the Gilsonite Strip lands, to be disestablished. The Tribe does not contest these conclusions.

establish is "clear from the surrounding circumstances and legislative history" of the opening acts. *Rosebud*, 430 U.S. at 586.

With respect to the Uncompahgre Reservation, the Court of Appeals noted that the Uncompahgre Utes never bargained with the United States for the termination of their reservation as did the Sioux Indians in *Rosebud* and *DeCoteau*, but indeed opposed the proposed opening. Pet. App. 19a. The Court of Appeals also found that in 1897 Congress was not at all concerned with disestablishing boundaries, but rather was concerned with questions of title, specifically providing non-Indians access to gilsonite and other minerals found on the Uncompahgre Reservation. Pet. App. 23a. Finally, the Court of Appeals observed that while references in newspapers and other documents at the time of the opening included ambiguous references to the Reservation as "old" or "former", the most significant and meaningful event occurring since opening was supportive of continued reservation status—namely the restoration by Congress of 500,000 acres of Hillcreek Extension trust lands located primarily within the Uncompahgre Reservation to Ute Indian Tribe ownership in 1948. Pet. App. 13a.

Turning to the unallotted lands opened on the Uintah Valley Reservation, the Court of Appeals affirmed the findings of the District Court that the legislative history and surrounding circumstances failed to show a clear congressional intent to extinguish Reservation boundaries. Both courts relied upon the following facets of the legislative history: first, that in contrast to the Sioux In-

dians involved in the Reservation openings examined in *DeCoteau* and *Rosebud*, the Ute Indians were "unanimously opposed" to the opening of their Reservation, Pet. App. 207a; second, that the 1905 Act was understood by Congress to restrict the opening of the Reservation to entries only under the homestead and townsite laws and in so doing superseded the public domain language found earlier in the 1902 Act, Pet. App. 234a-235a; and third, that a 1945 Secretary of Interior order restoring 217,000 acres of opened lands to the Ute Indian Tribe was found in a formal opinion of the Solicitor of the Department of the Interior to include minerals underlying fee patented lands located within the Uintah Valley Reservation. Pet. App. 264a, citing 59 I.D. 393, 396 (1947). Based on these findings and others, both courts concluded that the legislative history and surrounding circumstances do not show a congressional intent to disestablish.

Finally, with respect to the setting apart of national forest lands, the Court of Appeals first found that the congressional purposes for creating national forest lands as of the time of opening in 1905, including the protection of the watershed, the protection of timber resources, and the protection of fish and game could be fully achieved on national forest lands located within the Uintah Valley Reservation boundary. Pet. App. 27a. The Court of Appeals also noted that the inclusion of the national forest lands within the Uintah Valley Reservation was wholly consistent with subsequent acts of Congress compensating the Tribe for the value of its timber reserves and then later restoring subsurface mineral interests on a portion of the forest lands to the Tribe. Pet. App. 29a. For all of these reasons, the Court of Appeals correctly concluded

that the legislative history and surrounding circumstances contained no evidence of a congressional intent to extinguish the Ute Indian Reservations or to reduce the boundaries of the Reservations.

C. The Court of Appeals Properly Concluded That Post-Opening Events Do Not Reveal a Clear Congressional Intent to Disestablish.

In each disestablishment case this Court has given some consideration to post-opening events in determining whether Congress clearly intended to disestablish. *See, e.g., Mattz,* 412 U.S. at 505; *DeCoteau,* 420 U.S. at 442-448; and *Rosebud,* 430 U.S. at 604-605. In accordance with these governing precedents, the Court of Appeals also considered post-opening events.

With respect to the post-opening events affecting the Uncompahgre Reservation, the Court of Appeals adhered to this Court's ruling in *Mattz,* and found that the 1948 restoration of 500,000 acres of Hillcreek Extension tribal lands primarily located within the Uncompahgre Reservation boundaries was "suggestive of continued reservation status". Pet. App. 13a. Moreover, the Court of Appeals followed the teachings of *DeCoteau* and *Solem,* in noting that there was no indication of a number of settlers "flooding" into the opened portion of the Reservation causing the area to lose its Indian character. Significantly the Court of Appeals found to the contrary: "Few people, Indian or non-Indian live there today. The character of the area is not changed to such an extent that the reservation has de facto disappeared." Pet. App. 25a.

With respect to the unallotted portions of the Uintah Valley Reservation, the lower courts found a long time pattern of inconsistent and overlapping federal, state, and tribal jurisdiction, and concluded: "One thing is certain: the jurisdictional history of the [Uintah Valley] Reservation is not one of 'unquestioned' exercise of state authority . . . ." Pet. App. 268a-269a, citing *Rosebud*. Finally, when examining the post-opening events affecting the national forest lands, the Court of Appeals took note of Congress' post opening payment of compensation to the Ute Indian Tribe for the value of timber lands as well as Congress' subsequent decision to return a portion of the forest lands to Ute tribal ownership. Pet. App. 29a. The Court of Appeals found an uninterrupted congressional policy for national forest lands which gives priority to federal management while permitting state, and in this case, tribal participation in the regulation of hunting and fishing. Pet. App. 27a. As a result the Court of Appeals correctly concluded that Congress had never "clearly evidenced" an intention to disestablish the Ute Indian Reservations' boundaries. Pet. App. 26a.

II

THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURT'S PRECEDENTS IN RULING THAT THE PHRASE "RESTORE TO THE PUBLIC DOMAIN" APPEARING IN TWO STATUTES SUPERSEDED BY THE 1897 AND 1905 OPENING ACTS DID NOT EFFECT A DISESTABLISHMENT.

In Part I we showed how the Court of Appeals properly applied this Court's governing precedents in holding that neither the 1897 nor the 1905 opening Act effected a

disestablishment of the Ute Indian Reservations. In this Part II, we show that the Court of Appeals also correctly followed this Court's teachings in holding that the phrase "restore to the public domain" appearing in certain predecessor statutes (but omitted from the operative 1897 and 1905 opening Acts) did not effect a disestablishment of the Uncompahgre and Uintah Valley Reservations. The Petitioners repeatedly draw this Court's attention to the superseded 1894 and 1902 legislation and away from the operative 1897 and 1905 opening Acts which, of course, contain no language resembling "restore to the public domain". Notwithstanding Congress' removal of this phrase, Petitioners ask this Court to disregard the holding in its most recent disestablishment case, *Solem v. Bartlett, supra*, and find that appearance of "restore to the public domain" in superseded legislation effected an extinguishment of the Uncompahgre and Uintah Valley Reservations. As the Court of Appeals concluded, this contention does not withstand analysis.

In analyzing the effect of the phrase "restore to the public domain," the Court of Appeals once again carefully applied the governing principles set out by this Court. Pet. App. 18a. In *Solem*, this Court discussed the impact of "public domain" language appearing in the 1908 Act opening the Cheyenne Indian Reservations.[7] In the 1908 Act, Congress provided that once the lands were opened, tribal members would be able to harvest timber on the lands but "only as long as the lands remain part of the public domain." *Solem*, 465 U.S. at 475. This Court noted

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[7] Act of May 29, 1908, 35 Stat. 460.

that while such a phrase was supportive of a finding of diminishment it was not dispositive, in part because it may well have referred to land title rather than to a diminishment in reservation boundaries. Indeed, this Court observed: "There is also considerable doubt as to what Congress meant in using the phrase public domain". *Solem,* 465 U.S. at 475, n.17. This Court concluded that when balanced against the limited goal of the 1908 Act (to open the Cheyenne Indian Reservation to non-Indian entry but not to disestablish the Reservation), the presence of the phrase "public domain" "cannot carry the burden of establishing an express congressional purpose to diminish". *Id.*

This Court's holdings in *Solem* as to the meaning and weight to be given the phrase "public domain" operate *a fortiorari* in the setting of the opening Acts affecting the Ute Indian Reservations. In *Solem,* the phrase was placed by Congress in the operative 1908 opening law, and yet this Court held the phrase was not sufficient to carry the burden of establishing a congressional purpose to diminish. In the present case, the phrase "restore to the public domain" is found only in predecessor statutes enacted in 1894 and 1902, and not in the 1897 and 1905 operative opening Acts. Congress chose to replace the words "restore to the public domain" when enacting the 1897 and 1905 operative laws which actually opened the Uncompahgre Reservation and the Uintah Valley Reservation with language markedly similar to language found by this Court in *Mattz v. Arnett* not to effect a disestablishment. *See, supra,* p. 8.

Once again, the Court of Appeals' analysis of the phrase "restore to the public domain" tracked this Court's

governing holdings and acknowledged that the phrase "public domain" is ambiguous in portent and can relate both to title and to boundary. Pet. App. 18a. The Court of Appeals further noted that "[i]n the case before us the ambiguity of the term is only heightened by its subsequent exclusion in the 1897 Act"[8], and held, as did this Court in *Solem*, that the presence of "public domain language alone is insufficient to support a finding of explicit congressional intent to disestablish". Pet. App. 18a.

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[8] Citing, *Mattz*, the Court of Appeals emphasized that because the "terms of the 1894 Act were never fulfilled" and "the effort to impose the Act on the Uncompahgres was dropped in 1895", it declined to find a clear intent to disestablish from a phrase found ambiguous by this Court and appearing only in the "unrealized" 1894 Act but not in the operative 1897 opening Act. Pet. App. 18a and n.4.

CONCLUSION

In holding that no disestablishment occurred, the Court of Appeals faithfully applied this Court's numerous precedents to the unique history of the two Ute Indian Reservations in northeast Utah. Hence, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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